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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 627

VINCENT D. TODISCO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

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Certiorari should be granted in order to afford this court an opportunity to reconsider On Lee v. United States, 343 U. S. 747, to overrule it and establish as the law the principles urged by the dissenting opinions in that case and in Olmstead v. United States, 277 U. S. 438, or, at the least, to limit the application of On Lee 2

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This brief is being filed with the consent of the parties pursuant to Rule 42(1) of this Court. The letters of consent are being sent to the Clerk of this Court concurrently with the forwarding of this brief.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is a voluntary membership organization dedicated to the preservation and effectuation of the personal rights guaranteed by the Constitution. (*Cf. Rochin v. California*, 342 U. S. 165; *Mapp v. Ohio*, 367 U. S. 643). Because the instant case presents an important question involving the right to freedom from unreasonable search and seizure, it files this brief *amicus*.

I.

Certiorari Should Be Granted in Order to Afford This Court an Opportunity to Reconsider On Lee v. United States, 343 U. S. 747, to Overrule It and Establish as the Law the Principles Urged by the Dissenting Opinions in That Case and in Olmstead v. United States, 277 U. S. 438, or, at the Least, to Limit the Application of On Lee.

The Petition for Writ of Certiorari makes a forceful showing, we believe, for the proposition that the instant case is sufficiently different from *On Lee* so that that case should not be permitted to control here. Just as in *Silverman v. United States*, 365 U. S. 505, 512, where this Court "decline(d) to go beyond *(Goldman v. United States*, 316 U. S. 129), by even a fraction of an inch," so here the Court should decline to permit *On Lee* to be extended beyond its own facts. On this basis, certiorari could properly be granted and the decision below reversed.

We desire to urge herein, however, the broader point, also discussed in the Petition for Writ of Certiorari, that the trend of the decisions of this Court has been such that *On Lee* no longer represents the law and, in any event, should not be the law and should be overruled. We submit that the trespass concept as the *sine qua non* for adjudging Fourth Amendment rights is inadequate for, and does not face up to, the problems of today and, perforce, tomorrow. More in keeping with the times is the concept of the invasion of privacy.

In *Olmstead v. United States*, 277 U. S. 438 (1921), a 5-4 decision involving telephone wire tapping, Mr. Justice Brandeis foresaw the kind of a case presented by

the instant and the *On Lee* cases, and even beyond. In his dissent he said (*277* U. S. at 472, 473, 474):

> "'We must never forget,' said Mr. Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. ed. 579, 601, 'that it is a Constitution we are expounding.' . . . Clauses guaranteeing to the individual protection against specific abuses of power, must have a . . . capacity of adaptation to a changing world . . . (quoting from Weems v. U. S., 217 US 349, 373 re changing institutions). . . ."

Page 473:

> ". . . 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

Page 474:

> ". . . The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Way may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . ." (Quoting from *Boyd v. U. S.*, 116 US 616, 627-630: 'It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the

offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.')"

The time envisioned by Mr. Justice Brandeis in *Olmstead* is already here or is rapidly approaching.[1] The instruments used in *Goldman* and *Silverman* have already been surpassed. No longer is it necessary to place an instrument on the other side of a party wall or to insert a spike therein.

In the Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2d Sess., on Wiretapping, Eavesdropping, and the Bill of Rights, May 20, 1958, pp. 17 and 18, instruments (parabolic microphones and tubular microphones) are described as being even then in existence by which "(o)ne could be pointed from one office window to another across the street and pick up the conversation inside the second office." (P. 17.) Note was taken of such, or even a more effective, device by Mr. Justice John Vincent Barry of the Victoria, Australia, Supreme Court in his Article, "An End to Privacy," 2 Melbourne Univ. L.R. 443. Knowledge of American electronic prowess has not been confined

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[1] *Cf.* Note by John C. Love, Jr., commenting on the trial court decision in *Silverman*, 31 Miss. L.R. 306, 308:

". . . in the effort to allow officers more freedom in obtaining evidence by the use of scientific equipment, the fundamental right of privacy has been further infringed upon, as Mr. Justice Brandeis predicted in his dissent in *Olmstead* and as the other three justices who dissented in *Olmstead* and the three justices who dissented in *Goldman* seemed to fear."

to these shores. Justice Barry quotes from a 1957 Report of the California Senate Judiciary Committee (p. 449):

> "'The electronic tools for monitoring private conversations are both subtle and literally, far reaching. Their amoral physical capabilities suggest, without need for elaboration, the extent to which the power of surveillance is outstripping the walls of personal privacy. . . .'"

Continuing from the California Senate Judiciary Committee Report, Justice Barry quotes (p. 450):

> "'Another most unusual type of equipment is the so-called shotgun microphone. Specially constructed of different length pipes, it can be aimed at a location up to several hundred yards away and listen in on even a hushed conversation. It can thus overhear conversations in such diverse places as a boat out on a lake, or a room in a house or skyscraper across the street. . . .'"[2]

Says Justice Barry (p. 453):

> "This disturbing volume[3] shows how far modern societies have moved along the road to the nightmarish society described by George Orwell in the novel *1984*. . . ."

As said by Professor Kamisar (*The Wire Tapping-Eavesdropping Problem: A Professor's View*, 44 Minn. L.R. 813, 892):

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[2]The same instrument is described in Miller, *The Open Ear. Surreptitious Conversation Monitoring Devices*, 12 Syracuse L.R. 361, 370.

[3]Referring to the book "The Eavesdroppers", by Dash, Knowlton and Schwartz (Rutgers Univ. Press, 1959).

". . . Nowhere, it seems, is one quite safe from the eavesdropper. Not in one's home or office or automobile. Not even in one's bathroom with the shower turned on!"

The trespass theory, therefore, does not solve the problem at hand. *Cf. Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law,* 49 Cal. L.R. 474, 483:

"Since the Supreme Court has in more than one case attempted to free the fourth amendment from the shackles of the common law of trespass it is not too much to hope that when the Court again turns to this problem it will, perhaps through the use of its rulemaking power, fashion a more satisfactory rule. . . ."

And see Note, 27 Geo. Wash. L.R. 735, 740 by George W. Warlick, commenting on the trial court's decision in *Silverman:*

"While it is submitted that it would be possible for the instant decision to be reversed without over-ruling *Goldman,* and that such a result would be of value by clearly enunciating a policy prohibiting searches involving trespasses to homes or offices, it must be realized that the result would be of dubious value in the particular area of eavesdropping. In view of the rapid advances in electronics, it appears that science is capable of developing even more ingenious instruments which will operate effectively without penetrating, or indeed, without touching a wall. It would be ludicrous to suggest that a victim of electronic eavesdropping is any less aggrieved because his wall was not penetrated. It is submitted that the in-

stant case emphasizes the desirability of the overruling of *Goldman*, for while the instant case presents a clear example of an unreasonable search, it differs from *Goldman* only by a matter of a few inches and a technicality. No reasonable distinction can be drawn between the injuries suffered by the defendants in the two cases. In determining the legality of electronic eavesdropping, the courts should look not to the methods, but to the results of the eavesdropping; and if it is determined that the privacy of a person's home or office has been invaded without a warrant, then evidence obtained should be suppressed."

See also: Smith, *Unreasonable Search and Seizure—Evidence Obtained by Electronic Listening Devices*, 24 Ga. B. Jl. 135, 138 (discussing this Court's decision in *Silverman*):

"The direction of the line that has emerged from successive cases in this area is not clear. In the future more cases will come forth involving far more strange and technical electronic devices. How far can the courts go in attempting to reconcile or decide these cases on the element of trespass? It appears that they have gone as far as they can go; therefore one can only wait to see if the courts right themselves back to a clear application of the Fourth Amendment wherein the rights of the individual are protected to the extent intended by the framers of the Amendment."

The history of the decisions subsequent to *Olmstead* is significant.

Of the five-man majority in *Goldman v. United States*, 316 U. S. 129 (1942), only two, Mr. Justice Black and Mr. Justice Douglas are now on the Court.[4] Both of these Justices, however, have, we believe, changed their views for they both dissented in *On Lee v. United States*, 343 U. S. 747 (1951). In so doing, Mr. Justice Douglas explained (343 U. S. at 762):

> ". . . I joined (in Goldman) in an opinion of the Court written by Mr. Justice Roberts, which adhered to the Olmstead case, refusing to overrule it. Since that time various aspects of the problem have appeared again and again in the cases coming before us. I now more fully appreciate the vices of the practices spawned by Olmstead and Goldman. Reflection on them has brought new insight to me. I now feel that I was wrong in the Goldman case. (He then quotes at length from Mr. Justice Brandeis' dissent in Olmstead.)"

And he then said (p. 765):

> "That philosophy is applicable not only to a detectaphone placed against the wall or a mechanical device designed to record the sounds from telephone wires but also to the 'walky-talky' radio used in the present case. The nature of the instrument that science or engineering develops is not important. The controlling, the decisive factor is the invasion of privacy against the command of the Fourth and Fifth Amendments."

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[4]The only other remaining member of the Court at the time of *Goldman* is Mr. Justice Frankfurter who dissented in that case and thought *Olmstead* should be overruled (316 U.S. at 136).

The only member of the five-man majority in *On Lee* now on the Court is Mr. Justice Clark. While, concededly, not addressing himself to the precise problem here, we believe it is not without significance that in writing for the Court in *Mapp v. Ohio*, 367 U. S. 643, 659 (1961), which overruled *Wolf v. Colorado*, 338 U. S. 25 (1949), Mr. Justice Clark took occasion to rely upon the dissenting opinion of Mr. Justice Brandeis in *Olmstead*. True, in concurring in *Silverman v. United States*, 365 U. S. 505 (1961), to be discussed below, Mr. Justice Clark, as well as Mr. Justice Whittaker, seemed to be using the language of trespass, nevertheless, as we say, the reliance on Mr. Justice Brandeis' dissent in *Olmstead* is not without significance.

The Court's continued acceptance of the rationale of Mr. Justice Holmes' and Mr. Justice Brandeis' dissents in *Olmstead* is seen from its reliance thereon in *Elkins v. United States*, 364 U. S. 206, 222-223 (1960) which overturned the "silver-platter" doctrine.

Silverman v. United States, 365 U. S. 505 (1961), is, of course, a significant case. While it is true that a reading of the case leaves one with the impression that the Court was still relying on the trespass doctrine, refusing to re-examine *Goldman* while also refusing to extend it by even a fraction of an inch, yet it is noteworthy, we think, that the Court quoted (365 U. S. at 512, f.n. 4) from Judge Jerome Frank's dissenting opinion in *On Lee* in the Court of Appeals (*United States v. On Lee*, 193 F. 2d 306, 315, 316 (CA 2, 1951); see also p. 317). Moreover, quite frankly, we have difficulty in seeing an actual trespass in *Silverman*. The Government's brief in that case, extracts

of which (from pages 5-6) we set out in the margin,[5] only adds to our inability.

In any event, we submit, the question is significant and important enough and the present status of the trespass doctrine sufficiently unclear to justify a hearing in this case.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[5] "The officers had an electronic amplifying device consisting of a small battery-operated amplifier and earphones to which was attached an antenna referred to as a 'needle' or 'spike.' It was not a true spike, as it could not be driven into a wall, due to the delicacy of the needle (R. 102-103, 161). The needle was 11¾ inches in length (R. 102). . . . The officers searched along the second floor wall in No. 410, adjoining No. 408, for a crack into which the needle could be partially inserted, employing a trial-and-error probing under the baseboard with the wire of a straightened clothes-hanger (R. 115, 141-142). They did not remove or tamper with the baseboard (R. 116, 142) and they did not make a hole anywhere (R. 100).

"The officers ultimately discovered a crevice extending part way into the party wall from a point between the floor and baseboard in the front room. This crevice was employed thereafter (R. 100, 115-117). The party wall was 13 to 14 inches thick and the officers testified that they inserted the needle only about 5½ or 5⅞ inches, half of its length, at which point something solid blocked further insertion (R. 84, 100, 103-104, 122-123, 143, 148; *cf.* 'Possibly' 6½ inches, R. 161). . . ."